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No. 96-1498 (5)

In The

Supreme Court of the United States

October Term, 1996

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY,

Petitioner,

v.

SCIOTO WATER, INC., AND DANIEL R. GLICKMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSED MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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OPPOSED MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To: The Supreme Court of the United States.

1. Cass Rural Water Users Incorporated hereby respectfully moves that this court permit it to file a brief in this case amicus curiae pursuant to Rule 33 of the Rules of this Court. The applicant has obtained the consent of the Petitioner in this cause to file said brief, but has not obtained consent of the Respondent.

2. The grounds of this motion are as follows:

a. The movant is a non-profit rural water district which is directly impacted by the Sixth Circuit Court of Appeals' decision for which the Petitioner seeks review.

b. The movant is involved in a dispute, which is based on issues that parallel the issues before the Court in this action.

c. The amicus curiae brief for which this motion is filed is necessary to demonstrate the impact of the Court's decision on those other than the immediate parties.

d. The issues for which the Petitioner is requesting the Court's consideration are issues that impact the movant and rural water associations nationwide. The need for clarification and guidance on these issues are crucial to the continued existence of rural water associations.

3. Walter Dellinger, Acting Solicitor General of the United States Department of Justice, and Ralph Tarr, counsel for Petitioner, Scioto County Regional Water District No. 1, have granted their consent to the filing of Movant's Brief as amicus curiae. After correspondence

with Steven L. Mowery, counsel for Respondent, Scioto Water, Inc., and James Coombe, counsel for Respondent, U.S.D.A., the same have withheld their consent of the filing of Movant's Brief as amicus curiae.

4. Cass Rural Water Users Incorporated respectfully prays that it be accorded leave to file a brief amicus curiae in order to present arguments and viewpoints on the matters involved in the case, which the parties themselves may not present.

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INTEREST OF AMICUS CURIAE

Cass Rural Water Users Incorporated is a rural water association that has been negatively impacted by the decision of the Sixth Circuit Court of Appeals in this cause. Cass Rural Water Users's interests are detailed more fully in the Motion for Leave to File Brief Amicus Curiae that accompanies this Brief.

Cass Rural Water Users submits this Amicus Brief in support of Petitioner, Scioto County Regional Water District No. 1's Petition for Writ of Certiorari. The Petitioner is requesting that a writ be granted and that the Court take this opportunity to provide guidance to the federal and state courts that are currently faced with this issue and will be inundated by cases following the Sixth Circuit decision. We support and join in the Petitioner's request.

INTRODUCTION

Cass Rural Water Users Incorporated is a non-profit corporation organized to provide water and make water service available to residents of rural areas in Cass County, North Dakota, an area recently devastated by flooding. Cass Rural Water serves all areas in Cass County that fall outside a boundary located in and around the city limits of Fargo, North Dakota, most of which is rural, with the exception of a few small towns located in the service area.

The system was constructed in the 1970's to provide approximately 800 families in the Cass County area with improved water quality and quantity. Cass Rural Water

Users now serve more than 2,500 customers. More than 10,000 people in the Cass County area are benefitted by the inexpensive high quality water Cass Rural Water provides.

Cass Rural Water Users constructed a rural revenue-based water supply and distribution system in 1976 with money borrowed from the Farmers Home Administration under 7 U.S.C. § 1926(a) in 1976. In 1989 Cass repurchased its notes from FmHA as part of the Gramm-Rudman-Hollings Act (OBRA 1986, 1001), and refinanced the debt through a revenue-based loan with the Bank of North Dakota.

The City of Fargo is expanding into those areas which are currently served by Cass Rural Water. Fargo intends to provide competing water service and overlap these areas. Cass Rural Water intends to continue providing and making service available to those in its service area, which creates an obvious conflict. If Fargo is allowed to expand its competing water service within Cass Rural Water's service area, Cass Rural Water will be unable to fulfill the congressional purpose of rural water development, which is the financial viability of the rural water provider and low per-user cost.

The City of Fargo has a current population of approximately 80,400 and it continues to rapidly grow and expand. To date, Cass Rural Water Users have been able to prevent the curtailment by the City of Fargo with the protection afforded it under 7 U.S.C. § 1926(b).

REASONS FOR GRANTING THE WRIT

Cass Rural Water and rural water suppliers throughout the country will be directly and negatively impacted by the Sixth Circuit decision. The protection rural water associations have relied on and developed their services around has been destroyed by the decision. The precedent that has developed around and the interpretation of the protection provided by 7 U.S.C. § 1926(b) as extended by 1986 OBRA, 1001, as amended by ACA (1001(g)), up to this point has been clear: The notes and bonds sold were sold without removing the protection provided for rural water districts and their lenders, whether they were sold to third parties or the issuers. *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81, 85 and 90-91 (Colo. 1995). The decision of the Sixth Circuit directly contradicts that precedent and proper statutory interpretation.

By denying the Petitioner's request for a writ and allowing the decision of the Sixth Circuit to stand, the continued existence of Cass Rural Water and other rural water associations is threatened. Water associations throughout the country were created with the assistance of federal funds under 7 U.S.C. § 1926(a) and have continued to exist because of the protections against municipal curtailment afforded them under § 1926(b). The congressional purposes behind promoting the water associations were: "1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations

(and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987).

The only way Cass Rural Water, Scioto County and rural water associations nationwide can continue to provide an inexpensive and quality water supply to their patrons as intended by Congress is to spread the cost out over their existing customer base. In Cass Rural Water's case, by taking away those patrons of Cass Rural Water subsequently located in and near the City of Fargo by annexation, the ability of Cass Rural Water to meet its current obligations and continue operations is threatened, the effect of which would be financial devastation.

As did Scioto County Regional Water District, Cass Rural Water purchased its own notes under Section 1001 of OBRA. Water suppliers such as Scioto County and Cass Rural Water repurchased their notes and bonds with the understanding that the protection against encroachment under § 1926(b) would continue as per the language of ACA. If the Court does not address this issue, rural water associations such as Cass Rural Water and Scioto County would be subject to municipal curtailment thereby precluding their efforts to fulfill the legislative intent for rural water purveyors to provide an inexpensive and quality water supply to rural areas.

In the past it has been well settled that water suppliers who repurchased their notes under Section 1001 of OBRA were still afforded the protection of 7 U.S.C. § 1926(b) (Section 1001(g)). The preceding Sixth Circuit Court of Appeals and District Court decisions go against

this well settled application of the protection, as well as the precedent set by *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81. The Colorado Supreme Court in *Ute* found that the plain language of Section 1001(g) of OBRA included protection for rural water suppliers like Scioto County Regional Water and Cass Rural Water Users. As the Court in *Ute* found the language of Section 1001(g) of OBRA clearly includes protection for issuers who repurchased their notes and that protection should be continued. Cass Rural Water Users has relied heavily and had intended to rely on the *Ute* decision to challenge future curtailment by the City of Fargo.

The need for § 1926(b) protection has not changed. If anything, as in Cass Rural Water's case, the need for the protection has increased, as municipalities such as Fargo continue to expand. The municipalities are willing to provide services to densely populated areas, but are not willing to extend those services to the more sparsely populated areas currently served by rural water associations. Allowing municipalities to expand would adversely affect the congressional purpose, resulting in "lost economies of scale" and "higher per-user costs". *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, at 1059.

> To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents . . .

Id. at 1060.

By taking away the § 1926(b) protection originally and continuously afforded to these associations, they will lose their service areas located within or near cities' limits, thereby threatening the existence and continued economic viability of those rural water providers. To date, the application and interpretation has been that § 1926(b)'s protection clearly continues to protect those who repurchased their own notes. The protection of § 1926(b) must continue as it has in order to advance the legislative purpose intended: to provide an inexpensive, quality water supply to those in rural areas.

CONCLUSION

The Petition For a Writ of Certiorari by Petitioner Scioto County Water District No. 1 should be granted.

Respectfully submitted this 15 day of May, 1997.

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